



**United States Environmental Protection Agency  
Office of Water  
Office of Science and Technology**



## **Federal Water Quality Standards for Waters in Indian Country: Questions and Answers**

**April 2004**

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### **1) What is the Concern?**

Only 23 Indian tribes have water quality standards in place under the Clean Water Act. This leaves a land area of Indian country larger than the area of New England without water quality standards. Without applicable water quality standards, the Clean Water Act's mechanisms for protecting water quality in Indian country are limited. Federal promulgation would accelerate the coverage of standards in Indian country.

### **2) What Are Water Quality Standards and Why Are They Important?**

Water quality standards consist of designated uses (description of the goal for a waterbody, such as drinking, recreation, industrial or agricultural use, habitat for animals or plants), water quality criteria (limits on pollutants and conditions that will protect the designated use), and an antidegradation policy governing changes in water quality.

Water quality standards are a key component of the Act, and serve the dual purpose of establishing the goals for water bodies and serving as the regulatory basis for water quality-based controls. For waters with water quality standards in place:

- EPA, authorized tribes, states, and other federal agencies ensure water quality standards are met when issuing discharge permits and other federal licenses and permits under the Clean Water Act.
- Authorized tribes, states and EPA use results of monitoring projects to determine if designated uses of waters are supported.
- Where designated uses are not supported, EPA can identify impaired waters for restoration.
- For impaired waters or segments of waters, EPA, authorized tribes, and authorized states where necessary design pollutant loading plans affecting those waters to attain water quality standards.

3) **How Are Water Quality Standards Enforced under the Clean Water Act?**

Water quality standards help protect and improve water quality but they do not impose any directly enforceable requirements on any party. Rather, water quality standards serve as a basis for specific control actions that are enforceable, such as a NPDES permit to discharge pollutants.

4) **What Is “Indian Country”?**

“Indian country” is defined by Federal statute (18 U.S.C. 1151). It includes all of the territory within an Indian reservation (including land owned in fee simple by non-tribal members), and also includes “dependent Indian communities” and Indian allotments held in trust by the Federal government or under a restriction on alienation, regardless of whether or not they are located within a reservation. Based on Supreme Court case law, EPA construes the term “reservation” to include trust land that has been validly set apart for use by a Tribe even if that land has not been formally designated as a “reservation.”

5) **What Water Quality Standards Apply in Indian Country?**

There are two major ways water quality standards may be established under the Clean Water Act for waters of Indian country.

- Tribes may be authorized to administer a standards program, and adopt standards that then may be approved by EPA. To date, only 23 tribes have completed this process. Some tribes believe it would be difficult to obtain authorization.
- EPA can promulgate Federal water quality standards. EPA has promulgated such standards for one Tribe, the Confederated Tribes of the Colville Reservation in Washington in 1989.

6) **Do State Water Quality Standards Apply to Waters in Indian Country under the Clean Water Act?**

States generally lack the authority to regulate in Indian country. EPA has not found any State to have authority to adopt water quality standards under the Clean Water Act in Indian country.

7) **Why Is EPA Contemplating Promulgating Federal Water Quality Standards for Waters in Indian Country?**

EPA believes the proportion of tribes with standards will not increase significantly in the near future. EPA intends to work with all Tribes toward the goal of achieving the protection of water quality standards under the Clean Water Act for all waters in Indian country within a reasonable amount of time. EPA believes this can be achieved through a combination of eligible Tribes adopting their own standards under the Clean Water Act and EPA promulgating some form of Federal standards. Some form of Federal promulgation of water quality standards is a feasible and practical way to accelerate standards coverage in waters of Indian country.

8) **How Could Federal Water Quality Standards Provide the Basis for Water Quality Protection in Indian Country?**

Federal water quality standards under the Clean Water Act in Indian country could be the basis for a range of regulatory protections. For example:

- Such standards could provide a basis to protect tribal members who take and consume large amounts of fish from bioaccumulative pollutants. EPA, in consultation with the tribe, could use the federal standards as a basis to object to National Pollutant Discharge Elimination System (NPDES) permits in an upstream jurisdiction that did not control bioaccumulative pollutants to a level protective of the tribe's consumption rate.
- If a point source discharge (such as a mine) upstream from Indian country is contributing to downstream environmental problems such as high sediment loads in waters in Indian country with federal standards, EPA could potentially consult with the tribe and exercise its authority under the Clean Water Act to ensure that the mine's point source discharges are protective of the downstream Indian country water quality standards.
- If a NPDES regulated point source discharge in Indian country is causing a local problem because it does not have to meet water quality standards until the water flows into the downstream adjacent state, EPA could consult with the tribe and potentially use the federal standards as the basis for new permit restrictions to protect Indian country waters.
- If water quality problems are caused in part by inadequate streamflow, water quality standards under the Clean Water Act could potentially be helpful to facilitate discussions among federal agencies who may be responsible for the inadequate flow.

**9) Can Tribes Apply to Develop Their Own Water Quality Standards?**

Yes. EPA's preference is for tribes to develop and adopt their own federally-approved water quality standards where possible. EPA recognizes that many tribes have a number of pressing priorities, limited resources, and, in some cases, have recently established environmental offices, and EPA will continue to assist tribes to apply for approval for program authorization under the Clean Water Act and to develop their own standards. EPA has approved applications from several tribes in the past year.

**10) How Do Tribes Establish EPA-approved Water Quality Standards?**

Tribes follow a two-step process (which can run concurrently) to establish their own water quality standards under the Clean Water Act:

- Tribes apply for program authority under the Clean Water Act to administer water quality standards "in the same manner as a state" (Clean Water Act sec. 518 enacted 1987). EPA's regulatory requirements for these applications are found in 40 CFR 131.8 (published 1991). For tribes seeking to cover waters on non-member fee lands within a reservation, the tribe must show that water quality problems originating with non-members on the reservation can threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of the tribe that is serious and substantial.
- Tribes develop and adopt tribal water quality standards for their waters in Indian country. Tribes with program authority under the Clean Water Act to administer water quality standards submit their adopted water quality standards for their waters in Indian country to EPA for review and approval, pursuant to 40 CFR 131.

**11) What Has Been Done to Date?**

- In 1998-2000 EPA, in consultation with the Tribal Caucus and over 235 Tribal representatives, developed the concept of promulgating Federal water quality standards as a way to protect Indian country waters currently without Clean Water Act standards.
- On January 19, 2001, Administrator Carol Browner signed a proposed rule to promulgate "core" Federal standards in Indian country except where Tribes "opt out" to develop or work with EPA on specific standards. Core standards would include the basic provisions of standards as a first step that could be supplemented with more detail at a later date. A few days later, on January 22, 2001, EPA withdrew that proposal to allow Administrator Christine Whitman to review it. Administrator Whitman requested that EPA conduct additional consultation with Tribes and States before releasing a proposed rule.

- EPA has found that a number of issues had been raised both before and after 2001, with a mix of opinions including varying views from Tribes. EPA believes it should further consult with Tribes and States and obtain views from the public on specific aspects of promulgating Federal water quality standards for waters of Indian country.
- EPA has invested substantial effort in 2003 in preparing an Advanced Notice of Proposed Rulemaking (ANPRM) for Federal water quality standards for waters in Indian country. The ANPRM would present specific approaches and issues regarding a possible rulemaking to put Federal water quality standards in place for certain waters in Indian country. The ANPRM would invite public review and comment on these approaches and issues.
- As we developed the initial drafts of the ANPRM, EPA engaged in consultation/outreach with interested Tribal members of EPA's Tribal Operations Committee and members of the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA). The purpose of this consultation/outreach was to help EPA make the ANPRM balanced and factually accurate, and ensure the right topics are covered.
  - In August 2003, EPA provided a copy of the draft ANPRM to interested Tribal members and contacts, State contacts, interested Federal agencies, and other entities for comment.
  - In November 2003, EPA provided a revised draft of the ANPRM to the above entities for review and comment, and also sent the revised draft ANPRM to the Co-Chairs of the Regional Operations Committees of EPA's Tribal/EPA Work Group. EPA requested that comments to the November draft ANPRM be submitted to EPA by the first week of February 2004.
- EPA is currently reviewing detailed comments from fourteen Tribes, two Tribal organizations, four States, and two Federal agencies to our November 2003 draft ANPRM. A majority of Tribal commenters indicated a need for more formal consultation with Tribes on the potential rulemaking. In light of recent comments from Tribes, we are now reconsidering the timing and mode of consultation and outreach for this project as one of our next steps.
- As EPA continues our dialogue with Tribes and States on the implications of moving toward any Federal rulemaking, EPA will continue to listen carefully and fairly consider all perspectives. EPA will undertake government-to-government consultation with affected Tribes before any rulemaking on Federal water quality standards for waters of Indian country.

**12) Is There Any Additional Information Available on EPA's Website?**

Fact sheets, contacts, and other information regarding federal water quality standards for waters of Indian country is available on the Internet at <http://www.epa.gov/water/science/standards/tribal/>.

**13) Contact Information:**

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